THE PUBLIC SERVICE COMMISSION

OF SOUTH CAROLINA

DOCKET NOS. 2017-207-E, 2017-305-E, AND 2017-370-E

IN RE:	Friends of the Earth and Sierra Club, Complainant/Petitioner v. South Carolina Electric & Gas Company, Defendant/Respondent	
IN RE:	Request of the South Carolina Office of Regulatory Staff for Rate Relief to SCE&G Rates Pursuant to S.C. Code Ann. § 58-27-920	**SOUTH CAROLINA OFFICE OF REGULATORY STAFF'S RESPONSE TO JOINT APPLICANTS' MOTION FOR DECLARATORY RULINGS AND MOTION *IN LIMINE***
IN RE:	Joint Application and Petition of South Carolina Electric & Gas Company and Dominion Energy, Incorporated for Review and Approval of a Proposed Business Combination between SCANA Corporation and Dominion Energy, Incorporated, as May Be Required, and for a Prudency Determination Regarding the Abandonment of the V.C. Summer Units 2 & 3 Project and Associated Customer Benefits and Cost Recovery Plans	

The South Carolina Office of Regulatory Staff ("ORS") hereby submits this Response to the Joint Applicants Motion for Declaratory Rulings and Motion *in Limine* ("Motion").

INTRODUCTION

On October 19, 2018, the Joint Applicants filed the Motion seeking to prohibit the Public Service Commission of South Carolina ("Commission") from considering evidence of the imprudence and outright deceit of SCE&G, beginning with a series of poor decisions after the Project got off to a rocky start and culminating in a path of systematic fraud beginning in 2015

during the construction of V.C. Summer Units 2 and 3 (the "Units") at Jenkinsville (the "Project"). Among other arguments, the Joint Applicants make the remarkable assertion that the doctrine of collateral estoppel precludes ORS and other parties from arguing that SCE&G's intentional concealment of evidence should result in a disallowance of recovery of certain costs on the Project. In other words, the Joint Applicants are claiming that ORS and the intervenors are barred from arguing that SCE&G hid material evidence because that issue was litigated *before the other parties even knew the evidence existed.*[1]

This argument—as well as the other arguments raised by the Joint Applicants—are untenable. The Base Load Review Act ("BLRA") explicitly contemplates that the prudency of a utility's actions will be determined following abandonment of a base load plant, and the burden of proof is on SCE&G. Furthermore, none of the issues raised in these proceedings has previously been litigated—a fundamental requirement for collateral estoppel—only the initial prudency determination for SCE&G to pursue the Project a decade ago. Finally, as a federal district court has recently held, the 2018 amendments to the BLRA do not constitute a retroactive taking of SCE&G's property. For those and the following reasons, the Joint Applicants' motion should be denied.

DISCUSSION

In its Motion, the Joint Applicants argue that previous Project-related orders entered by the Commission preclude any examination of the prudency of SCE&G's conduct in relation to the Project. The Motion should be denied because collateral estoppel cannot preclude the Commission from hearing and receiving into evidence all facts concerning the Project.

[1] On October 25, 2018, the Commission issued Order No. 2018-154-H, which held the ruling of such dispositive motions in abeyance. ORS requested and received an extension of time to respond to the Motion until November 5, 2018. *See* Commission Order No. 2018-158-H.

Additionally, ORS's position does not contravene the Supreme Court's opinion disallowing contingencies that are not known and measurable in cost schedules. Last, Act 258's prudency clarifications can and should be applied in this proceeding.

A. Collateral Estoppel Does Not Preclude the Commission from Hearing and Receiving into the Record All Evidence Concerning the Project.

1. The BLRA Requires a Prudency Determination in These Proceedings and Does Not Contemplate that the Initial Prudency Determinations Are Binding Post-Abandonment.[2]

After abandonment, a prudency determination is required. *See* S.C. Code § 58-33-280(K)[3]; *see also S.C. Energy Users Committee*, 410 S.C. at 358, 764 S.E.2d at 918 (finding "the BLRA provides for a course of action [relating to prudency determinations] in the event of abandonment"). The determination that the Project was prudent for purposes of beginning construction, seeking a modification of an initial order, or assessing rates (*see* §§ -270 & -275) was not intended to be "final" within the meaning of the doctrine of collateral estoppel in the case of abandonment based on Section 58-33-280(K).

Section 58-33-280(K) provides that "[w]here a plant is abandoned after a base load review order" then the utility may still recover its costs "provided that the utility shall bear the burden of proving by a preponderance of the evidence that the decision to abandon construction

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[2] SCE&G, in one of its recent motions to dismiss in the 2017-207-E docket, even states that "…as SCE&G has maintained throughout the course of these proceedings, a full opportunity to evaluate the prudency of the project is available to Complainants in Docket No. 2017-370-E …." (Mot. Dismiss 5, filed October 8, 2018). SCE&G should also be bound by this prior representation to the Commission.

[3] Section 58-33-280(K) reads in full:

> Where a plant is abandoned after a base load review order approving rate recovery has been issued, the capital costs and AFUDC related to the plant shall nonetheless be recoverable under this article provided that the utility shall bear the burden of proving by a preponderance of the evidence that the decision to abandon construction of the plant was prudent. Without limiting the effect of Section 58-33-275(A), recovery of capital costs and the utility's cost of capital associated with them may be disallowed only to the extent that the failure by the utility to anticipate or avoid the allegedly imprudent costs, or to minimize the magnitude of the costs, was imprudent considering the information available at the time that the utility could have acted to avoid or minimize the costs. The commission shall order the amortization and recovery through rates of the investment in the abandoned plant as part of an order adjusting rates under this article.

of the plant was prudent." Section 280(K) continues that the utility will not recover costs "to the extent that the failure by the utility to anticipate or avoid the allegedly imprudent costs . . . was imprudent considering the information available to the utility at the time that the utility *could have acted* to avoid or minimize the costs." *Id.* (emphasis acting). Thus, the statute clearly contemplates a historical investigation of when the utility could have acted, *i.e.* when it *would* have acted if it were behaving prudently. The legislature did not intend that previous Commission rulings on prudency would prevent the Commission from all investigation of prudency after abandonment.

SCE&G misapprehends the effect of abandonment on prior prudency determinations when it argues that assessing the prudency of SCE&G's imprudent decisions would contravene *S.C. Energy Users Committee v. SCE&G*, 410 S.C. 348, 764 S.E.2d 918 (2014). In *Energy Users*, the Supreme Court did hold that determinations made under the BLRA "may not be challenged or reopened in any subsequent proceedings." *Id.* At 359, 764 S.E. 2d at 918. But, *S.C. Energy Users* addressed a request to reopen the initial determination that construction of the plant was prudent during a proceeding to modify that underlying order. That is not the posture of this case. Crucially, the plant and construction have been abandoned and are not constructed or being constructed.

Section 58-33-275(A) indicates that "[a] base load review order shall constitute a final and binding determination that a plant is used and useful for utility purposes and that its capital costs are prudent utility costs and expenses[.]" This presumption only stands "so long as the plant is constructed or is being constructed[.]" S.C. Code Ann. § 58-33-275(A). The Joint Applicants lean on Section 58-33-275(B), which provides that determinations under Section 58-33-275(A) "may not be challenged or reopened in any subsequent proceeding, including proceedings under

. . . Section 58-33-280[.]" (*See* Mot. 25.) Code section 58-33-280 is about Revised Rates, and subsection K incorporates the standards of Code section 59-33-275(A) and its conditional language limiting the initial prudency findings only as long as the plant is being constructed within the parameters of the approved construction schedule and forecasted costs.

However, Section 58-33-275(B) should not receive the broad reading the Joint Applicants request. (*See also* Commission Order No. 2013-5 at 23-24 ("[U]nder the BLRA, prudent costs are recoverable, even with a plant abandonment, while imprudent costs are not. The BLRA guards ratepayers from an attempt by the utilities to recover imprudent costs. The Commission has always been governed by this principle in BLRA cases[.]" (citing Order No. 2012-884 at 68)). The Joint Applicants' broad reading of Section 58-33-275(B) ignores entirely Section 58-33-275(A)'s language that the initial prudency determination lasts only "so long as the plant is constructed or being constructed" and fails to give effect to the language of Section 58-33-280(K) mandating a renewed prudency determination post-abandonment. *See 16 Jade Street, LLC v. R. Design Const. Co., LLC.*, 398 S.C. 338, 343, 728 S.E.2d 448, 450 (2012) ("Similarly, we are to construe a statute so 'that no word, clause, sentence, provision or part shall be rendered surplusage, or superfluous."); *see also SCE&G Co. v. Randall*, No. 3:18-cv-01795-JMC, 2018 WL 3725742, at *11 (D.S.C. Aug. 6, 2018). SCE&G's reading is also inconsistent with the fundamental purpose of the BLRA "to protect customers from responsibility for imprudent financial obligations or costs." S.C. Code Ann. § 58-33-210, Ed.'s Note 1; *Energy Users Comm.*, 410 S.C. at 354, 764 S.E.2d at 916; *see also Florence County Democratic Party v. Florence County Republican Party*, 398 S.C. 124, 128, 727 S.E.2d 418, 420 (2012) ("The statutory

language must be constructed in light of the intended purpose of the statute." (citation omitted)). Therefore, a prudency review after abandonment is appropriate and required.[4]

2. Collateral Estoppel Does Not Preclude the Commission from Considering all Evidence in These Proceedings.

Beginning no later than March 12, 2015, SCE&G deliberately and repeatedly misled the Commission by withholding material information about the projected construction schedule and forecasted costs. (Direct Testimony of G. Jones, filed 2018/9/24, 4:22-23, 9-16.) By "early 2014," SCE&G had been made aware "that the project needed an independent comprehensive assessment of the construction status, schedule and budget and had begun planning for such an assessment." However, SCE&G "withheld these plans from the PSC and ORS." (Direct Testimony of G. Jones, 9:22-10:2.)

SCE&G already realized that the Consortium's "schedule and cost estimates were seriously flawed and suspect." (*See* Direct Testimony of G. Jones, 10:3-4; Dep. K. Browne 64:20-23 ("There were people in the project who knew everything that was in the Bechtel study before Bechtel ever showed up on site."); Dep. K. Browne 140-142 (schedule SCANA received from Westinghouse in 2014 was a "joke")). SCANA began to discuss with Santee Cooper "in May 2014 that the Owners should engage an outside expert to assist with the management of the EPC contract." (Direct Testimony of G. Jones, 10:19-21, Ex. GCJ-2.9; *see also* Ex. GCJ-2.17.) SCE&G did not apprise the Commission or ORS, however, of its intent to retain an outside expert or that it ultimately hired one. Under these circumstances, it would not be just to apply collateral estoppel.

[4] These arguments equally apply to the Joint Applicants' arguments that the Commission could not conduct any prudency reviews after 2009. (*See* Mot. 22-23.)

SCE&G's withholding of material information denied other parties and the public a full and fair opportunity to litigate in those proceedings. *See Hewins*, 409 S.C. at 106, 760 S.E.2d at 821 (2014) (applying collateral estoppel requires "the party against whom estoppel is asserted had a full and fair opportunity to previously litigate the issue." (internal quotation omitted)). The Joint Applicants now argue that the collateral estoppel doctrine – which requires prelitigation of the same facts – bars litigation of facts that ORS and the intervenors did not even know about during the previous proceedings, much less litigated. This argument is specious.

According to the South Carolina Supreme Court in *Pye v. Aycock*, 325 S.C. 426, 480 S.E.2d 455 (1997) (internal citations and quotations omitted): "collateral estoppel bars relitigation of the same facts or issues necessarily determined in the former proceeding." An initial prudency determination before the Project even begins is not the same facts or issue as an abandonment petition ten years later. More importantly, "the application of res judicata and collateral estoppel may be precluded where unfairness or injustice results, or public policy requires it." *Mr. T. v. Ms. T*, 378 S.C. 127, 662 S.E.2d 413 (Ct. App. 2008) (internal citations and quotations omitted).

Public policy, as embodied in the text of the BLRA, itself precludes the application of collateral estoppel in this case. As do considerations of fairness and justice. *See State v. Hewins*, 409 S.C. 93, 106, 760 S.E.2d 814, 821 (2014) ("[E]ven if all the elements for collateral estoppel are met, when unfairness or injustice results . . . courts may refuse to apply it."). Deception and fraud certainly create unfairness and injustice in precluding any review of SCE&G's actions during construction and in imposing tremendous costs on ratepayers, who have already paid more than $2 billion to finance the Project.

"Fraud upon the court is a serious allegation involving corruption of the judicial process itself." *Chewning v. Ford Motor Co.*, 354 S.C. 72, 78, 579 S.E.2d 605, 608 (2003) (citations and

internal punctuation omitted). ORS does not make it lightly. "Fraud upon the court . . . subvert[s] the integrity of the Court itself[.]" *Evans v. Gunter*, 294 S.C. 525, 529, 366 S.E.2d 44, 46 (Ct. App. 1988) (internal quotation and citation omitted).

In its purest form, fraud on the court involves a "deliberately planned and carefully executed scheme to defraud" the tribunal. *See Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 245-46 (1944). This sort of conduct "does not concern only private parties" but raises "issues of great moment to the public in" the type of action in which the fraud was perpetrated. Thus, the harm wrought "involves far more than an injury to a single litigant. It is a wrong against the institutions set up to protect and safeguard the public, institutions in which fraud cannot complacently be tolerated consistently with the good order of society." *Id.* Ultimately, it is "[t]he public welfare" that compels a finding "that the agencies of public justice be not so impotent that they must always be mute and helpless victims of deception and fraud." *Id.*; *accord Chewning*, 354 S.C. at 79, 579 S.E.2d at 609.

Fraud upon the court must be extrinsic rather than intrinsic. *E.g. Raby Constr., L.L.P. v. Orr*, 358 S.C. 10, 19, 594 S.E.2d 478, 483 (2004). "The essential distinction between intrinsic and extrinsic fraud is the ability to discover the fraud." *Ray v. Ray*, 374 S.C. 79, 85, 647 S.E.2d 237, 239 (2007). "Extrinsic fraud, as opposed to intrinsic fraud, is often difficult, if not impossible to discover during the litigation." *Id.* "[C]oncealment of a document coupled with an intentional scheme to defraud the court" can be sufficient to establish extrinsic fraud. See *id.* at 86, 647 S.E.2d at 241. "The doctrines of res judicata and collateral estoppel do not bar collateral attack of a judgment based on fraud." *Evans v. Gunter*, 294 S.C. 525, 528, 366 S.E.2d 44, 46 (Ct. App. 1988) (citing *Arnold v. Arnold*, 285 S.C. 296, 328 S.E.2d 924 (Ct. App. 1985)).

The purposeful deception of SCE&G by systematically withholding material information made discovery of that deception "difficult, if not impossible ...." *See Ray*, 374 S.C. at 85, 647 S.E.2d at 239. The BLRA required that SCE&G provide quarterly updates, which included, among other things, the progress of the construction of the plant, updated construction schedules, and updated schedules of anticipated cost. According to former SCANA CEO Kevin Marsh, "[SCANA employees] understand [their] responsibility as a company is to manage the project prudently and to bring our issues and challenges to the Commission and ORS in a candid and transparent way. We appreciate the accountability that regulatory oversight provides."[5]

Instead of being candid and transparent, SCE&G suppressed the critical information that it had painstakingly developed over months, showing the shortcomings that made the dates and numbers submitted to ORS and the Commission unreliable. *See* Corrected Transcript of the Continued Dep. of C. Walker ["Dep. C. Walker Vol. II"] 36:6-39:22; *see also* Dep. K. Browne 146:22-147:4 (discussing internal SCANA e-mail from Kevin Kochems: "'I think this [schedule that we base EAC on] needs to be [the] schedule we plan to file with the PSC whether we think it is achievable or not.'")). There was no turning back: "[O]nce you tell one white lie . . . the next time the lie has got to get a little bit bigger." (Dep. C. Walker 120:23-25.) The lies were made so that SCANA could "make earnings gross – growth and bonuses." (Dep. C. Walker Vol. II 30:18-20.)

SCANA understood that the BLRA allowed SCANA to roll its capital expenditures related to the Project in one year into its rates for the next. (*See* Dep. C. Walker Vol. II 161:1-3). The result was "glorious" earnings that "[drove] up the stock value." (Dep. C. Walker Vol.

[5] *See* Direct Testimony of Kevin Marsh in Docket No. 2012-203-E, p. 29, ll. 1-4; *see also, e.g.*, Direct Testimony of Stephen Byrne in Docket No. 2015-103-E, p. 4, ll. 16-19 ("Much of the change in risk profile of the project has to do with the major risk factors that are being wholly or partially mitigated.").

II 161:4-6.) It also "[drove] up company bonuses that are *all tied to earnings*." (Dep. C. Walker Vol. II 161:6-7 (emphasis added)); *see also* Dep. C. Walker 22:25-23:2 (short-term bonuses based on earnings goals for the company set by "senior staff"); Draft Transcript Dep. J. Addison 4:25-5:1 (testifying he believed he "received every bonus that [he was] eligible to receive in connection with the VC Summer project").

SCE&G further failed to share information relating to scheduling which, crucially, would impact its ability to secure the Production Tax Credits on which the feasibility of the Project depended. (G. Jones Direct Testimony 18:10-13.) Additionally, when discussing the Production Tax Credits, Mr. Marsh asserted "the important point is that we qualify for the credits," despite having information that SCE&G did not share with ORS or the Commission that Unit 2 was unlikely to qualify and that there was serious risk that neither would qualify at the time Mr. Marsh made his statement.[6] While SCE&G may have provided quarterly updates that included some information, it did not make a good faith effort to be open and transparent to include all known and materially relevant information in these updates.[7]

Furthermore, according to ORS witness Gary Jones: "SCE&G deliberately and repeatedly misled the PSC and ORS by withholding key information on the projected construction schedule."[8] According to Jones, "'the evidence of record' required by the [BLRA] to be provided by SCE&G was incomplete, omitted and misleading, and SCE&G used deception to obtain PSC approval of erroneous schedules and cost estimates." (G. Jones Direct Testimony 5:3-6.)

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[6] *See* Direct Testimony of Kevin Marsh in Docket No. 2016-223-E, Tr. p. 140, ll. 3-4; *see also* Dep. K. Browne pp. 146-147 ("I did not, and I'm sure Kevin [Kochems] did not either, believe that it was an achievable schedule")

[7] Implicitly, a statutory mandate requires acting in good faith.

[8] Direct Testimony of Gary Jones filed on September 24, 2018, in Commission Docket No. 2017-370-E, p. 4, ll. 22-23.

SCE&G inverts the maxim that final judgments must be accorded finality in order to retain the spoils gained through conduct that actively corrodes the rule of law. (*See* Mot. 3.) *See, e.g.*, *Chewning*, 354 S.C. at 78, 579 S.E.2d at 608 ("Fraud upon the court is a serious allegation involving corruption of the judicial process itself.") Because SCE&G deliberately planned and executed a scheme to hide material information and deceive the Commission, the doctrine of collateral estoppel does not bar the Commission from hearing evidence of that deception in a subsequent and different proceeding under a different Code section, different inquiry, and different burden of proof. Likewise, the doctrine cannot restrict the parameters of the Commission's ultimate decision and order.

B. The Commission is Not Barred From Considering SCE&G's Refusal to Disclose Material Facts During Construction.

SCE&G next argues that under *S.C. Energy Users Comm. v. S.C. Pub. Serv. Comm'n*, 388 S.C. 486 (2010), it could not present the internal cost estimates it knew to be the most accurate because "cost contingencies based on engineering concerns about the risks of not achieving [] forecasted productivity factors could not be included in the cost schedules for the NND project." For that reason, SCE&G claims it was required to present "the actual cost schedules that were provided by Westinghouse and the Consortium" even if it knew they were not accurate or achievable. (Mot. 22.)

Contingency costs "do not represent costs SCE&G anticipates incurring in constructing the nuclear facility." *S.C. Energy Users Comm. v. S.C. Pub. Serv. Comm'n*, 388 S.C. 486, 495, 697 S.E.2d 587, 592 (2010). Because by March 12, 2015 SCE&G anticipated having to pay costs beyond those identified by Westinghouse and the Consortium in August 2014, the costs that it knowingly hid from the Commission were not contingency costs. Internally, SCE&G senior executives understood that the Consortium's schedule and budget were deeply flawed.

(Dep. C. Walker 49:7-50:14; Depo. of K. Browne 147:24-148:1.) SCE&G anticipated more than half a billion dollars in higher costs than it disclosed to the Commission based on its internal review of the Consortium's EAC update in late 2014. (*See* EAC Review Team Prelim. Update, Dep. K. Browne, Ex. 15; *see also* Surrebuttal Testimony of Gary C. Jones 6:3-8:5.)

Tellingly, SCE&G relied on its undisclosed, internal numbers to assess the favorability of Westinghouse's proposed fixed price contract during those negotiations in the fall of 2015. In deciding whether and how to protect itself against rising costs, SCE&G did not rely on the Westinghouse 2014 EAC it provided to ORS and the Commission as the "best information" available. (Dep. K. Browne 103:5-19.) Certainly, SCE&G was not required "by law" to lie to the Commission and hide evidence that SCE&G had been ordered by the Commission to provide.

Finally, SCE&G overlooks that the issue is its lack of disclosure of material information to the Commission and ORS, not the costs for which it ultimately would have gained approval to recover. SCE&G was not prohibited from disclosing this information to the Commission, as it argues. There is no doubt that this information was sensitive and could have a serious impact on SCANA as a publicly traded company. However, the proper course would have been to file the complete portfolio of information under seal with the Commission and to request *in camera* review. It was not SCE&G's prerogative to filter or withhold relevant and material information from the Commission, and the Commission is the proper arbiter of what was to be done in light of all relevant and material information.

C. The Prudency Standards in Act 258 Should be Applied in This Case.

SCE&G characterizes the prudency definition in Act 258 as "new." In fact, it is not. The BLRA did not specifically define "prudent." Thus, "[w]hen faced with an undefined statutory term, the term must be interpreted in accordance with its usual and customary meaning." *S.C.*

Energy Users Comm. v. S.C. Pub. Serv. Comm'n, 388 S.C. 486, 492, 697 S.E.2d 587, 590 (2010) (citing *Branch v. City of Myrtle Beach*, 340 S.C. 405, 409–10, 532 S.E.2d 289, 292 (2000)); *Anderson v. South Carolina Election Comm'n*, 397 S.C. 551, 556, 725 S.E.2d 704, 707 (2012) ("Unless there is something in the statute requiring a different interpretation, the words used in a statute must be given their ordinary meaning.").

Looking to plain and ordinary meaning, "prudent" refers to being "[w]ise in handling practical matters; exercising good judgment or common sense" and being "[c]areful in regard to one's own interests" or "about one's conduct[.]" American Heritage College Dictionary (4th ed.) (defining "prudent"). Case law provides additional guidance. To evaluate prudency, we look to the information available to the utility at the time the decision was made. *See South Carolina Energy Users Committee v. SCE&G*, 410 S.C. 348, 355, 764 S.E.2d 913, 916 (2014)).

Indeed, this definition is consistent with how SCE&G has applied "prudency" before the Commission in the past. When discussing the Production Tax Credits, Kevin Marsh stated that the prudent thing was to "do everything you can to protect the credits."[9] In addition, Mr. Marsh agreed that "prudence" was universally understood and that SCE&G was following that understanding in Docket No. 2015-103-E, when he testified:

> **[Kevin Marsh]** "'Prudence' is universally understood under a prudency test, a standard by which management action is to be judged, as that of reasonableness under the circumstances, given what was known or should have been known at the time the decision was made or action was taken."…"The concept of prudence implies a standard or duty of care owed to others. In building a nuclear power plant, the Nuclear Regulatory Commission requires the utility to exercise a high standard of care in order to protect the public health and safety. Similarly, given the costs involved and the rate impact of those costs on monopoly customers, this Commission finds that the utility should be held to a high standard of care in making decisions and taking actions in its planning and constructing such a project. Thus, while the standard to be applied is reasonableness under the circumstances, where the risk of harm to the public and ratepayer is greater, the standard of care expected from the reasonable person is higher. Given this standard, reasonable person is one who is

[9] *See* Docket No. 2016-223-E, Tr. P. 142, ll. 3-4.

> qualified by education, training, and experience to make the decision or take the action, using information available and applying logical reasoning processes."
>
> **Q: [Bob Guild]** All right. Thank you. Mr. Marsh, I take it that you would accept that language, description, by the Georgia Court, aptly captures what you believe to be your competence in making judgments about the terms on which this nuclear project is going forward?
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> **A: [Kevin Marsh]** It sounds like a reasonable explanation of the activities we've undertaken to identify these additional costs and evaluate those costs prior to presenting them to the Commission as an amendment to the capital cost schedule.[10]

Act 258's definition of "prudent" is not substantially different from the meaning of prudent in ordinary language. Act 258 codifies in writing that the term "prudent" used in the BLRA and defines it such that it means, "a high standard of caution, care, and diligence in regard to any action or decision taken by the utility or one acting on its behalf including, but not limited to, its officers, board, agents, employees, contractors, subcontractors, consultants affecting the project, or any other person acting on behalf of or for the utility affecting the project."

The definition of prudence in Act 258 is not substantively different than the definition by which all parties measured prudent actions prior to Act 258. Thus, Act 258's definition of prudence may be considered in this proceeding. In order for Act 258 to be improperly applied retroactively, it must attach *new* legal consequences to events completed before its enactment. According to the U.S. Fourth Circuit Court of Appeals:

> "A rule does not operate retroactively simply because it 'upsets expectations based in prior law.' *Landgraf v. USI Film Prods.*, 511 U.S. 244, 269[] (1994). Rather, to have a retroactive effect, a statute must 'attach[ ] new legal consequences to events completed before its enactment."

Khattak v. Ashcroft, 332 F.3d 250 (4th Cir. 2003); *see also Velasquez-Gabriel v. Crocetti*, 263 F.3d 102 (4th Cir. 2001).

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[10] *See* Docket No. 2015-103-E, Tr. pp. 163-166.

Because Act 258 clarifies the meaning of the term "prudence" and adds nothing new, no new legal consequences were created. Therefore, it is not improper for the Commission to apply Act 258's definition of prudency.

In fact, a federal district court correctly rejected SCE&G's same argument earlier this year:

> In its preliminary injunction motion, SCE&G argued, "The Act attaches new legal rights and consequences to events and actions that have already happened, including by redefining 'prudency,' a critical term under the BLRA establishing what is, and is not, subject to capital cost recovery." However, the BLRA did not define "prudency," so the Act cannot "redefin[e]" "prudency." Instead, the Act provides the first definition of the term "prudency" and "imprudency" as related to the BLRA. "Altering statutory definitions, or adding new definitions of terms previously undefined, is a common way of amending statutes, and simply does not answer the retroactivity question." Neither does the Act's definition of "prudency" in this case answer the retroactivity question. SCE&G argues, "The definition of 'prudent'. . . is explicitly not related to concepts of 'negligence, carelessness, or recklessness,' which leaves entirely unclear the standard that the PSC should impose under this new definition." However, the same was true before passage of the Act because the BLRA did not define "prudency," also leaving unclear the standard that the PSC should impose when making prudency determinations. Therefore the Act does not "attach[] new legal consequences to events completed before its enactment."

SCE&G Co. v. Randall, No. 3:18-cv-01795-JMC, 2018 WL 3751470, at *2 n.5 (D.S.C. Aug. 7, 2018) (quoting *Rivers v. Roadway Exp., Inc.*, 511 U.S. 298, 308 (1994), and *Langraf v. USI Film Prods.*, 511 U.S. 244, 270 (1994)).

SCE&G's conduct is not imprudent because of Act 258. It is imprudent because SCE&G took unreasonable actions in the pursuit of gain under circumstances in which a

reasonably prudent person would have chosen to chart a starkly different course. For the aforementioned reasons, the prudency definition as given in Act 258 may be properly applied by the Commission in these proceedings.

CONCLUSION

SCE&G's Motion requires the Commission to ignore that much of these consolidated proceedings arose because of SCE&G's actions and deceit. If SCE&G had been honest and transparent with ORS and the Commission, then the BLRA could have provided a safety net for SCE&G and the Project. Instead of sharing the results of its internal reviews and third-party assessment and complying with its obligations under the BLRA, SCE&G attempted to plaster over known, material delays and cost overruns. SCE&G then covered up the problems, causing them to grow substantially beyond any possible recovery and now asks the Commission to make the ratepayers pay for the mismanagement and deception.

The Motion seeks to further mask SCE&G's failures and wrongdoing by using the initial prudency determination to pursue the Project as a shield against accountability for its choices. Collateral estoppel cannot preclude the Commission from hearing and receiving into evidence all facts regarding the project. The rest of the arguments in the Motion also fail to provide the relief Joint Applicants seek.

For the forgoing reasons, ORS respectfully requests that the Commission deny the Joint Applicants' Motion.

Respectfully submitted,

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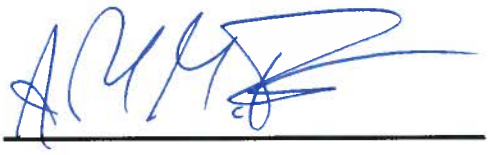

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